ST 96-49
Tax Type: SALES TAX
Issue: Audit Methodologies and/or Other Computational Issues
Interstate Sales (Non-Verified)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
ADMINISTRATIVE HEARINGS DIVISION
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, **Petitioner**	)	**No.**
v.	)	**IBT No.**
TAXPAYER **Taxpayer**	)	**Linda K. Cliffel, Admin. Law Judge**

RECOMMENDATION FOR DISPOSITION

APPEARANCES: William W. Austin of Parker, Siemer, Austin & Resch for taxpayer.

SYNOPSIS:

TAXPAYER is a sole proprietorship owned by OWNER. On audit, the Department determined that taxpayer had underreported the gross receipts of its retail sales for the period 1/1/88 to 9/30/91, and issued Notice of Tax Liability (hereinafter "NTL") No. XXXXX for Retailers' Occupation Tax pursuant to 35 ILCS 120/1 *et seq*. Taxpayer protested on two grounds, one that some purchases of TAXPAYER were transferred to the Florida store owned by OWNER, and second, that the auditor had incorrectly calculated the gross mark-up percentage.

Following the submission of all evidence and a review of the record, it is my recommendation that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. TAXPAYER ("hereinafter "TAXPAYER") is a sole proprietorship owned and operated by OWNER. TAXPAYER is engaged in the retail sale of jewelry and gift items as well as providing some jewelry repair services.

2. In 1989, OWNER formed a corporation, CORPORATION, in Florida to do business as a jewelry store. This store was run by his daughter. (Tr. p. 13; Taxpayer's Ex. No. 2)

3. Taxpayer did not produce during the audit any invoices for the period 1/1/88 through 12/31/89 on the advice of counsel. (Tr. p. 21)

4. In the absence of records, the auditor projected sales for 1988 and 1989 based on invoices from suppliers in 1990 and 1991. (Tr. pp. 19-22)

CONCLUSIONS OF LAW:

On examination of the record in this case, the taxpayer has not presented sufficient competent evidence to overcome the Department's *prima facie* case. Accordingly, for the reasons given below, the aforementioned NTL should be affirmed in its entirety.

Pursuant to 35 ILCS 120/4, the Correction of Returns submitted as Dept. Ex. No. 3 is *prima facie* correct and constitute *prima facie* evidence of the correctness of the amount of tax due as shown

thereon. *See also*, A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3rd 826 (1st Dist. 1988). Once the Department establishes the *prima facie* correctness of the amount of tax due via admission into evidence of the Correction of Returns, the burden shifts to the taxpayer to show that such determination is incorrect.

In order to overcome the presumption of validity attached to the Department's corrected returns, the taxpayer must produce competent evidence, identified with its books and records showing that the Department's returns are incorrect. Copilevitz v. Department of Revenue, 41 Ill.2d 154 (1968). Taxpayer has attempted to show, by way of the introduction of a federal income tax return for CORPORATION, two workpapers and a typewritten note, that inventory was transferred from TAXPAYER to FLORIDA in Florida rather than sold. The federal tax return was prepared by a CPA in Florida who was not available to testify. The note was purportedly written by taxpayer's daughter, who also did not testify. The workpapers were apparently part of the federal return workpapers and prepared by the Florida CPA and possibly another CPA or the taxpayer's daughter. These documents were admitted without foundation. Taxpayer's CPA testified as to his conclusions regarding these documents, but he did not prepare the tax return, workpapers or note, and his testimony cannot be given any weight since this evidence is hearsay and inadmissible.

The second prong of taxpayer's argument, that the auditor's markup calculation was incorrect, is supported only by taxpayer's CPA's testimony and his own workpapers. The taxpayer's CPA calculated his own markup percentage based on taxpayer's canceled checks and bank statements (Tr. pp. 19-31) and arrived at a smaller

number than the auditor's markup percentage. Pursuant to Departmental Regulations (Admin. Code ch. I, Sec. 130.801), persons engaged in the business of selling tangible personal property at retail are required to keep books and records of all sales and purchases. No books and records of the taxpayer, however, were either examined by the auditor or introduced into evidence for the tax periods 1988 and 1989.

The taxpayer was in possession of the relevant purchase invoices but chose not to turn them over to the auditor. (Tr. p. 21) Pursuant to the facts in this case, the CPA's testimony is not sufficient to rebut the *prima facie* correctness of the Department's assessment in the absence of taxpayer's production of records which he is required by Illinois law to keep. *See*, Copilevitz, *supra*.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Tax Liability No. XXXXX be finalized as issued.

Date: _____

Linda K. Cliffel
Administrative Law Judge